Supreme Court, U.S.
FILED

05-494 OCT 14 2005

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No. _____

In the Supreme Court of the United States

MONIKA CHESHEWALLA, ROBERT J. PETKOFF, AND AARON P. MICHAELS,
Petitioners,

v.

RAND & SON CONSTRUCTION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an employer escape vicarious liability for sexual harassment committed by a female worker's direct boss and immediate superior in the chain of command by reserving the actual power to hire and fire to an officer in the home office who never comes into contact with female workers on the basis that the direct boss is not a "supervisor" for purposes of Title VII?

2. May the court of appeals disregard the precedent of this Honorable Court recognizing that vicarious liability for sexual harassment may also be predicated on the harasser's apparent authority to take tangible employment action against the victim?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 415 F.3d 847 (8th Cir. 2005) and is reproduced in Appendix A to this Petition. The district court's order granting defendant's Motions for Summary Judgment is unreported and reproduced in Appendix B to this Petition.

STATEMENT OF JURISDICTION

The decision of the court of appeals and judgment were entered on July 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 2000e-2(a) provides as follows:

> (a) Employer practices. It shall be an unlawful employment practice for an employer– (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

STATEMENT OF THE CASE

This is a case of severe sexual harassment of petitioner Monika Cheshewalla by her foreman, Michael Gibbins. The district court granted summary judgment for defendant Rand & Son Construction Company ("Rand"), holding that Rand was not vicariously liable for the acts of foreman Gibbins because he did not have the actual authority to hire, fire, promote, or transfer employees and was therefore not a "supervisor" for purposes of Title VII. The court of appeals affirmed.

The court of appeals refused to consider Monika Cheshewalla's contention that, even if actual authority to hire and fire was required and even if foreman Gibbins did not have it, Rand should be vicariously liable for his harassment on the "apparent authority" standard announced in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). In so doing, the Eighth Circuit flatly rejected this Court's holdings.

The district court and the court of appeals also dismissed petitioners' retaliation claims.

A. Michael Gibbins' Sexual Harassment of Monika.

Gibbins was Monika's foreman at Rand. His sexual harassment of her was both pervasive and monstrous. He exposed himself to her at work and asked if she wanted to "fuck."[1] He sexually and physically harassed, threatened,

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[1] Eighth Circuit Appendix, Volume 4 ("4 App.") 1190 (290:22-291:21.)

assaulted, and battered her at work.[2] He forced her to submit to his demands for sexual intercourse by threatening her job and the jobs of her friends.[3] He used physical force against her to procure sex.[4] He took her car and would not give it back to her, instead making her ride to and from work with him.[5]

At work, Gibbins told her that if she would not be his girlfriend and let him touch her, he would have all of her friends fired but would keep her on the job and "make her life hell."[6] He proved to her that he could and would have her friends fired.[7] Alternately, he told her that if she did not submit to his sexual advances, he would hurt her physically and would have her job taken away from her.[8]

Gibbins procured her silence about his sexual harassment by threatening her with severe consequences if she told others

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[2] 2 App. **524-525**, ¶ 8; 4 App. **1055** (112:1-25), **1065** (151:7–152:25, 153:4-6), **1070** (172:2-24), **1084** (228:20-23), **1102** (298:14-19), **1114-1115** (24:2-19, 24:23–25:8-13), **1138** (118:4-25).

[3] 4 App. **1138** (120:8-22).

[4] 4 App. **1051** (96:5-13), **1052** (97:6-22), **1053** (102:3–103:22), **1054** (105:10-11).

[5] 4 App. **1058** (124:14) through **1060** (130:3), **1063** (142:9-22, 143:24–144:3), **1064** (145:5-7).

[6] 2 App. **521**, ¶ 2; 4 App. **1096** (276:1) through **1097** (277:2).

[7] 4 App. **1096** (276:8) through **1097** (277:2).

[8] 2 App. **521**, ¶ 2; **1099** (285:20–286:2), **1100** (292:15) through **1101** (293:2).

about his harassment of her.[9] He told her that if she told anyone about his conduct, he would hurt her physically and would tell people she was "messing up" and would have her job taken away from her.[10] He told her they would find her with her "head bashed in with a bullet hole in it."[11]

B. Gibbins as Monika's Supervisor.

Gibbins (i) was the only person who assigned and directed Monika's work, (ii) was the only person who gave her any information about the quality of her work and her job performance, (iii) decided whether she could or could not seek medical treatment if she were injured on the job, (iv) decided if Monika should work overtime, (v) told Monika and other laborers if layoffs were coming, (vi) told individual laborers that they were laid off, and (vii) told Monika that he could fire her and other workers.[12]

Rand Vice President Ernest Patires and Rand EEO Officer Linda Christian admitted that Gibbins was the foreman over laborers and in the chain of command above Monika.[13] Christian confirmed that Gibbins supervised other people including Monika, that Rand considered Gibbins to be

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[9] 2 App. 521, ¶ 2; 526, ¶ 16; 4 App. 989 (46:25–47:6), 1055 (112:21-25), 1073 (182:2–183:2), 1084 (20-23), 1096 (276:8) to 1097 (277:2, 279:1-21, 280: 5-22), 1099 (285:20–286:2), 1100 (292:15) through 1101 (293:2), 1102 (298:5-8, 10-24).

[10] 2 App. 521, ¶ 2; 1099 (285:20–286:2), 1100 (292:15) through 1101 (293:2).

[11] 2 App. 354.

[12] 2 App. 520; 4 App. 1055 (112:21-25).

[13] 4 App. 937 (164:24) through 938 (165:3), 1014 (11:4–12:13).

"supervisory personnel," and that Gibbins was Monika's boss.[14]

Rand Superintendent Dave Burke, Carpenter Foreman Danny Franks, and other "higher-ups" at Rand specifically told Monika that Gibbins was her foreman and supervisor.[15] Gibbins confirmed that he was "the boss of the crew" and was in "the chain of command."[16]

However, Vice President Ernie Patires was the only Rand employee with the ultimate authority to "hire and fire."[17] But Patires was not at the job site assigning, observing, or directing Monika's (or any other employee's) work and had no job interaction with her.[18] Patires could not have had direct, personal knowledge of who were the good workers and who were the bad workers and who should be laid off first because he only went to the job site once a month to look at the job and he "deals mainly with supervisor."[19]

Patires acknowledged that he relied on the supervisors' recommendations in determining who would be laid off.[20]

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[14] 4 App. **910** (56:18) through **911** (57:2), **915** (164:24–165:3).

[15] 4 App. **1050** (91:23-92:13).

[16] 4 App. **982** (17:19–18:3).

[17] 4 App. **1015** (13:3-8).

[18] 2 App. **520**.

[19] 2 App. **336-337**; 4 App. **883** (19:12-19).

[20] 4 App. **961** (23:21-24:8), **963** (30:24–31:5), **1015** (13:9-14:7, 14:12-15:2), **1020** (35:6–36:10).

Gibbins admitted that he had the power to recommend names for layoff and that, in the past, he had actually suggested the names of persons who would laid off.[21]

C. Rand Knew Gibbins Was Claiming Supervisory Authority and Ability to Lay Off Workers and Did Nothing to Stop Gibbins from Making These Claims.

Vice President Patires knew that Gibbins was threatening to fire Monika "if she told."[22] EEO Officer Christian admitted that (i) Gibbins was using Monika's friends as a threat to get favors from her, (ii) Monika believed everything Gibbins told her about layoffs, and (iii) Gibbins' apparent power to hire and fire could have been a concern to Monika.[23] Nothing in the record shows that Rand ever criticized or took action against Gibbins for threatening to fire Monika or that Rand instructed Gibbins to stop such conduct.

D. Reporting and Retaliation.

For many months, Gibbins' harassment went unreported because Monika believed that Gibbins would follow through with his threats if she came forward. Monika had previously seen women in the construction industry get forced out of work if they made sexual harassment complaints.[24] When Monika's friends were laid off after Gibbins' threat to Monika

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[21] 4 App. 999 (88:2-23).

[22] 2 App. 367 (headed "12:35 p.m."); 4 App. 1022 (41:3-15).

[23] 2 App. 354.

[24] 4 App. 1039 (48) through 1040 (49-50, 52), 1043 (64) through 1044 (65-68).

that he would cause that to occur, she became a believer.[25] Monika was afraid to talk to EEO Officer Linda Christian because "she couldn't afford to lose her job" and if anyone found out she talked to Christian, "she would not be able to work again."[26] She was also afraid she would suffer bodily harm if she told: Gibbins told her that if she told anyone about his conduct, he would hurt her physically.[27] He said she would be found with her "head bashed in with a bullet hole in it."[28]

Finally, co-workers and petitioners Rob Petkoff and Aaron Michaels complained. Petkoff made an anonymous call to EEO Officer Christian advising her that Gibbins was sexually harassing Monika.[29] Petkoff and Michaels subsequently complained about Gibbins' harassment to Rand Superintendent Dave Burke, Carpenter Foreman Danny Franks, EEO Officer Christian, and Vice President Patires.[30] Monika also eventually provided considerable detail regarding Gibbins' sexual harassment and physical threats.[31]

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[25] 2 App. **352**, **521**, ¶ 3; 4 App. **1055** (112:21-25), **1083** (222:14-19), **1102** (299:1-9).

[26] 4 App. **914** (71:8) through **915** (74:19), **957** (6:22–7:5).

[27] 2 App. **521**, ¶ 2; **1099** (285:20–286:2), **1100** (292:15) through **1101** (293:2).

[28] 2 App. **354**; 4 App. **1102** (298:10-24).

[29] 2 App. **343**; 4 App. **915** (75:3) through **916** (77:6).

[30] 2 App. **352**, **367**, **524-528**; 4 App. **960** (17:2-9), **969** (56:1-7), **1113** (20:20) through **1114** (21:4).

[31] 2 App. **345**, **350**, **353-354**; 4 App. **923** (106:18–107:16).

Rand's follow-up investigation yielded substantial, detailed information from seven separate employees documenting Gibbins' sexual harassment and threats.[32] Rand had overwhelming evidence that (i) Gibbins sexually harassed Monika, (ii) Rand on-site supervisory personnel over Gibbins were closing their eyes to it, and (iii) Monika was being threatened by Gibbins not to report his conduct.[33]

After Petkoff confronted Gibbins about harassing and threatening Monika, Gibbins complained to his friend, Superintendent Dave Burke; Burke then cancelled Petkoff's overtime that had been promised to him before he complained about Gibbins.[34] When Carpenter Foreman Franks was told about Gibbins' continuing harassment of Monika, Franks responded that Monika "would just have to deal with it."[35]

Petkoff and Michaels were laid off within days after reporting Gibbins' sexual harassment to EEO Officer

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[32] 2 App. **341, 343, 345, 346, 347, 350, 351, 352-354, 367, 524-528**; 4 App. **900** (14:2-16:12), **901** (17:7-18:8, 19:2-5), **913** (66:16-68:25), **915** (75:3) through **916** (77:6), **923** (106:18-107:16), **925** (113:16) through **926** (117:8), **1113** (20:20) through **1114** (21:4), **1159** (5:20-23), **1160** (9:8-22), **1161** (14:3-5), **1171** (53:24-54:19).

[33] 2 App. **343, 345, 346, 370, 371, 361, 378, 379, 437-463, 497-518**; 4 App. **902** (24:16-24), **908** (46:4-48:5), **913** (66:16-68:25), **917** (81:5-83:14), **919** (90:13-92:23), **929** (130:20) through **931** (138:1), **1098** (281:5-282:24), **1100** (290:8-21), **1105** (311:5) through **1106** (313:9)

[34] 4 App. **964** (33:9-23, 35:23-36:11), **966** (42:14-21.)

[35] 2 App. **521, 527, ¶** 20.

Christian (Petkoff, 4 days; Michaels, 12 days).[36] Their Carpenter Foreman, Danny Franks, was a good friend of Gibbins.[37] Franks admitted that it "bothered him" that Petkoff and Michaels were making their complaints and believed that the Gibbins' investigation "all started with Aaron and Rob."[38]

On January 25, 2001, Monika gave EEO Officer Christian gruesome details about Gibbins' sexual harassment and threats.[39] Instead of taking action against Gibbins, Christian asked Monika to sign a statement stating that she had no problem with Gibbins and that she had not been sexually harassed.[40] Christian also wanted Monika to sign a release of Rand agreeing not to sue for Gibbins' conduct.[41] Twenty-two days after Monika provided her details and refused to sign the statement and release, she was laid off.[42]

REASONS FOR GRANTING THE WRIT

If left to stand, the court of appeals opinion (at least in the Eighth Circuit and in other circuits which adopt its

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[36] 2 App. 333-334, 346, 524-528, 338-369; 4 App. 882 (15:24-16:3), 893 (59:23-60:2), 910 (54:9-55:4), 960 (17:2-9), 964 (33:9-34:12), 969 (56:1-7), 970 (57:8-24, 60:18-24), 1071 (175:9-17).

[37] 2 App. 333-334; 4 App. 964 (33:9-34:12), 970 (57:19-24, 60:18-24).

[38] 4 App. 970 (60:18-24).

[39] 2 App. 353-354.

[40] 2 App. 371; 4 App. 902 (24:16-24).

[41] 4 App. 1098 (281:5-282:24), 1105 (311:15) through 1106 (313:9).

[42] 2 App. 338-340, 520, 530.

philosophy) allows employers to completely escape vicarious liability for sexual harassment of innocent women in the workplace committed by the on-site supervisors at the job site. All the employer need do to escape liability is to reserve the actual power to hire, fire, and lay off workers to a person in the home office who never comes into contact with female workers; meanwhile, the actual, everyday boss of the female worker, who most certainly has and exercises power over her, is free to demand and exact sexual favors without the employer worrying about being vicariously liable for such conduct. By allowing this giant loophole, the Eighth Circuit has provided an inoculation against liability that is contrary to the precedent of this Court and is inimical to the interests of society.

This decision should be reversed.

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW DECIDED THE SIGNIFICANT THRESHOLD QUESTION OF "WHO IS A SUPERVISOR" IN A WAY THAT GIVES EMPLOYERS AN INOCULATION AGAINST LIABILITY AND EMASCULATES PROTECTION AFFORDED VICTIMS BOTH BY THE STATUTE AND THIS COURT'S PRECEDENTS.

If this case stands and becomes the law of the Eighth Circuit, employers will have a road map of how to escape vicarious liability altogether for severe and pervasive sexual harassment of innocent female victims committed by persons who clearly have power over them.

That is exactly what the lower court's opinion did in this case.

It is clear that Gibbins was Monika's actual supervisor. He was the only person on site who dealt with her, assigned her work, and evaluated her work. He was the only person who announced upcoming layoffs and told individual workers they were being laid off. Gibbins "was the company" to Monika. She never dealt with other supervisors who had any power to affect her employment.

Sexual harassment is an offense involving abuse of power. The person with the actual power in Monika's workplace was Gibbins. "Ernie" (the Vice-President in the home office) never dealt with the workers, did not know who the good workers were versus the bad workers, visited the job site only once a month, and had to rely on job site supervisors such as Gibbins in determining which specific workers would be laid off.

Following earlier Eighth Circuit precedent, however,[43] Rand "inoculated" itself from vicarious liability for sexual harassment by the "real" supervisors and persons of power at the job site. Rand designated "Ernie" as the only person who had the actual power to hire and fire. Ernie never had any interaction with the employees being hired, fired, or laid off. He talked to on-site supervisors such as Gibbins to find out about the quality of work of the individual workers and sought such supervisors' recommendations when it came time for layoffs.

Having done so, Rand no longer had to be concerned about vicarious liability for sexual harassment: (i) Ernie never had contact with the workers, and (ii) the on-site

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[43] *Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004); *Weyers v. Lear Operations Corp.*; 359 F.3d 1049 (8th Cir. 2004).

supervisors had no power to hire or fire or lay off. Rand had a perfect defense.

Will other employers follow suit? Absolutely. Will innocent women in industries such as are involved in the present case[44] become easy targets for harassers? Without a doubt.

This Honorable Court should grant this Petition because the facts of this particular case portray the problem in a very clear light. We suggest that this Court should use this case, and its very well developed record, to provide guidance on who is a supervisor in sexual harassment cases. Certainly such guidance is needed; without it, courts of appeal are free to effectuate a de facto repeal of the protection innocent female workers need and, presumably, are guaranteed by the civil rights laws.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON THE IMPORTANT ISSUE OF WHO IS A SUPERVISOR IN VICARIOUS LIABILITY SEXUAL HARASSMENT CASES.

Although this Court has clearly enunciated the principles involved to determine vicarious liability of the employer for supervisor sexual harassment, it has not defined who qualifies as a supervisor within those principles.

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[44] This case involves the construction industry where persons such as "Ernie" are located in the home office but the on-site supervisors who have direct power over workers are located at the job sites.

Decisions of the various circuits on the "who qualifies as a supervisor" issue are catalogued at 195 A.L.R. Fed. 463 (2004). The Eighth Circuit's holding in the instant case and in *Joens* and *Weyers* that a person is not a supervisor unless he has the actual and ultimate power to hire and fire is contrary to the following decisions from other circuits:

In *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), the Second Circuit held that the authority to direct the daily work activities of other employees qualifies the harasser as a supervisor.

In *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), *cert. granted*, 540 U.S. 1046, 124 S. Ct. 803, 157 L. Ed. 2d 692 (2003), the Third Circuit held that superiors who supervised day-to-day work activities in running their shifts may have had the requisite authority to commit tangible employment actions.

In *Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001), the Seventh Circuit held that the harasser qualified as a supervisor for imputing liability to the employer even though he did not have the power to hire or fire the plaintiff since he had the power to initiate disciplinary proceedings against her and to delay her receipt of essential equipment.

Conflicting authority exists in the lower courts regarding the circumstances that must exist for a person to be considered a "supervisor" for purposes of Title VII. The instant case presents an excellent record and clear fact pattern to lay that conflict to rest.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW CONFLICT WITH THIS COURT'S HOLDINGS THAT VICARIOUS LIABILITY IN A SUPERVISOR SEXUAL HARASSMENT CASE MAY BE PREDICATED ON APPARENT AUTHORITY IN INSTANCES WHERE THE HARASSER LACKS THE ACTUAL AUTHORITY TO TAKE TANGIBLE EMPLOYMENT ACTION.

Aside from the fact of who is actually a supervisor and who has actual authority to effectuate tangible employment consequences on a female worker, this Court added a second prong to the test of vicarious liability in the *Faragher* and *Ellerth* cases.

As this Court recognized in *Ellerth*:

> As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power. Compare Restatement § 6 (defining "power") with § 8 (defining "apparent authority"). In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context. If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one. Restatement § 8, comment c ("Apparent authority exists only to the extent it is reasonable for the third

> person dealing with the agent to believe that the agent is authorized.")

Ellerth, 524 U.S. at 759-60.

The district court opinion simply ignored the "apparent authority" prong of this Court's seminal cases. The evidence here establishes that, in addition to Gibbins having sufficient actual authority over Monika to make Rand liable under the "aided by the agency relation" rule as discussed above, Gibbins purported to exercise such power, and Monika's belief that he had such power was reasonable, thus making Rand liable under the apparent authority rule.

The evidence of Gibbins' apparent authority is mountainous. Without doubt, Gibbins was in the chain of command above Monika and Rand considered him "supervisory personnel." The "higher-ups" at Rand told Monika that Gibbins was her foreman and supervisor on the Rand job site. Rand did not have anyone higher than Gibbins in the chain of command interact with Monika in her job. Gibbins was the only one whom Rand used to communicate with Monika – he assigned and directed her work, gave feedback on her job performance, and as the messenger about job layoffs.

Gibbins was also very involved in the decisions as on what workers would be laid off during a work shortage. Vice President Ernie Patires, who did not go to the job site and did not have firsthand knowledge, relied on the supervisors' recommendations in determining who would be laid off. Gibbins actually recommended names for layoffs. Gibbins knew Monika needed her job and he regularly reminded her (or threatened her) that if she did not grant him sexual favors,

he would either lay her off or lay her friends off and "make her life hell."

Rand also knew that Monika was constantly afraid of being laid off. Additionally, Rand management knew that Gibbins was threatening to lay Monika off and that, as a result, she was afraid to talk about him. Carpenter Foreman Franks, Superintendent Burke, EEO Officer Christian, and Vice President Patires all had such knowledge. Franks and Burke heard the threat directly from Gibbins as well as from plaintiffs Petkoff and Michaels; Christian and Patires had information from Franks, Petkoff, Michaels, and Monika.

Christian and Patires told Monika that Gibbins could not lay her off, but Monika had seen tangible evidence that Gibbins could lay people off, which made her believe him. Additionally, Gibbins was the person who told the laborers about layoffs and was the messenger as to the specific persons who would be laid off. Monika had good cause to believe that Gibbins could, and would, follow through with his threats against her. Although Rand had substantial knowledge that Gibbins was purporting to exercise the authority to fire and lay off workers, the record shows that Rand did absolutely nothing to stop Gibbins from making those claims. He kept making them. There is not a shred of evidence showing that Rand even instructed Gibbins to stop such threats, much less any evidence of disciplining him for making them.

It cannot be stated any clearer than what EEO Officer Linda Christian wrote in her notes: "He [Gibbins] used her friends as a threat to get favors from her. She believed everything he told her about layoffs."

Rand thus is vicariously liable under the "apparent authority" standard. The Eighth Circuit, however, decided

that it would simply not recognize the apparent authority standard:

> Finally, Cheshewalla's belief that Gibbins possessed the authority of a supervisor does not alter our conclusion in this case. *See Weyers*, 359 F.3d at 1057 n.7 (noting that the alleged harasser's "apparent authority would be an insufficient basis to support a finding of supervisor status").

Cheshewalla v. Rand & Son Construction Co., 415 F.3d at 847, 851 (8th Cir. 2005) [Appendix A, pp. 5a-6a].

This Court should grant certiorari to make it clear that the apparent authority standard is a second and distinct prong of the vicarious liability analysis in supervisor cases. It is a fundamental part of the analysis and courts of appeals should not feel free to ignore it.

IV. THE RETALIATION CASE SHOULD ALSO BE RENEWED BECAUSE ITS DISMISSAL WAS A PRODUCT OF THE LOWER COURT'S FAILURE TO RECOGNIZE THE ACTIONABLE NATURE OF THE UNDERLYING CONDUCT.

The victim and the two construction workers who came forward to report the harassment were all laid off. Although Rand contends that the layoffs resulted from a lack of work, the layoffs occurred within days after they came forward. Furthermore, when Rand subsequently hired dozens of other workers and brought back others who had been laid off, petitioners' sanction for causing trouble by reporting sexual harassment was clear: permanent banishment from the Rand workplace.

The judgment against petitioners on the retaliation claims should be reviewed, as it is an integral part of the overall case.

CONCLUSION

The Eighth Circuit's definition of "supervisor" emasculates the rule and makes a farce out of the statutory protection to which innocent females in the workplace are entitled.

We submit that the powerful reasoning of this Court in *Ellerth*, *Faragher*, and scores of other cases should not simply go by the wayside. Granting this petition, we respectfully suggest, is an absolute must.

Respectfully submitted,

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October 17, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-3199

[Filed July 19, 2005]

Monika Cheshewalla, Aaron Paul Michaels, Robert J. Petkoff, Appellants,	)
v.	)
Rand & Son Construction Company, Appellee.	)

OPINION

Before Wollman, Hansen and Riley, Circuit Judges.

WOLLMAN, Circuit Judge.

Monika Cheshewalla, Aaron Michaels, and Robert Petkoff appeal from the district court's[1] grant of summary judgment

[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

on their Title VII employment-related claims. *See* 42 U.S.C. § 2000e *et seq*. Cheshewalla asserts sexual harassment and retaliation claims, while the latter two plaintiffs assert only retaliation claims. We affirm.

I.

Rand & Son Construction Company (Rand) provides construction services for various client companies, including Allied Honeywell (Honeywell), a defense contractor. Rand employees working at Honeywell were required to have a badge for security purposes. A red badge indicated that the individual was "uncleared," or lacked security clearance, and therefore had to be accompanied by a security guard. A yellow or blue badge indicated that the individual was cleared. The process of obtaining such clearance was complicated and could take up to eighteen months. In the event of a reduction in force, Honeywell preferred that Rand retain employees with blue or yellow badges over those with red badges. The plaintiffs, Rand employees, were assigned to Honeywell's maintenance project. Most Rand employees working at Honeywell were either carpenters or laborers. Michaels and Petkoff were hired in 2000, the former as a carpenter apprentice and the latter as a carpenter. Cheshewalla was hired as a laborer in the same year. All three plaintiffs were uncleared, having only red badges.

Since approximately 1995, Michael Gibbins served as foreman for the laborers at Honeywell, while Danny Franks served as the foreman for the carpenters. In these capacities, Franks indicated to Gibbins the work to be performed by the laborers. Dave Burke, the lead foreman stationed at the site, was above Franks and Gibbins in the chain of command. Ernest Patires, Rand's Vice President, served as the project manager for the Honeywell site, but was not stationed there.

On November 3, 2000, two female Honeywell employees reported to Linda Christian, Rand's EEO Officer, that one of Rand's employees was exposing himself to women. Christian's investigations led her to believe that Cheshewalla was being subjected to this behavior, and she contacted Cheshewalla and the three other female laborers working at Honeywell to obtain more information. Cheshewalla denied that anything had happened to her, but expressed her fear that she ran the risk of being fired by talking to Christian. Christian told Cheshewalla that she would not be fired for speaking to her. Christian did not learn who was exposing himself, and none of the women stated that they had been subjected to this display. Christian closed the file on this issue on November 16, 2000. Approximately three days later, a man, now known to be Petkoff, anonymously telephoned Christian and stated that Gibbins was harassing women. Petkoff did not specify which women or what Gibbins was doing to harass them. Gibbins was transferred to another job site the day of the telephone call. Petkoff and Michaels later complained about Gibbins's conduct to Burke, Franks, Christian, and Patires.

On approximately January 8, 2001, Gibbins was reassigned to the Honeywell site. On January 11, Christian heard rumors that Gibbins had been asking Cheshewalla for a date and that they were driving to work together. Hours later, Gibbins reported to Christian that he had heard rumors that he had sexually harassed Cheshewalla. The next day, Petkoff confronted Gibbins about Gibbins's treatment of Cheshewalla, and the labor union registered a sexual harassment complaint by Cheshewalla against Gibbins. The labor union's business agent, Les Williams, attempted to meet with the people involved, but Cheshewalla failed to attend. Gibbins was once again transferred from the Honeywell site, never to return. On January 16, Cheshewalla met with

Christian and Patires, and told them that Gibbins had been harassing her.

It is undisputed that the need for layoffs in the maintenance project arose in January of 2001. Rand's business is cyclical. The workload is lowest at the beginning of each year when the funding for government contracts has yet to be received. Therefore, layoffs commonly arose each year at this time. Michaels and Petkoff were laid off on January 29. Cheshewalla missed work on the last two days of January and on seven days in early to mid February. On February 16, the last of these nine days of absence, Patires informed Cheshewalla by telephone that she had been laid off.

II.

We review *de novo* the district court's grant of summary judgment. *Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005). We view the evidence in the light most favorable to the non-moving party and conclude that summary judgment was proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c).

Cheshewalla claims that she was subjected to a hostile work environment on the basis of sexual harassment by Gibbins. To establish a hostile work environment claim, Cheshewalla "must show that she was subjected to unwelcome sex-based harassment that was sufficiently severe or pervasive to alter a term, condition, or privilege of her employment." *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). Assuming, *arguendo*, that the alleged harassment was sufficiently severe to state a claim of hostile work environment, we turn to the question whether Gibbins is properly considered a co-worker or a supervisor. If the

former, Cheshewalla must also show that Rand "'knew or should have known of the conduct and failed to take proper remedial action.'" *Id.* (quoting *Dyne v. Meiners Thriftway*, Inc., 184 F.3d 983, 987 (8th Cir. 1999). If the latter, Rand "is vicariously liable for the harassment unless it can establish the affirmative defense defined in *Burlington Indus., Inc. v. Ellerth*." *Joens*, 354 F.3d at 940; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) (noting that the affirmative defense is available only when no tangible employment action is taken). Because we conclude that Gibbins was not a supervisor, we do not discuss the affirmative defense.

In *Joens*, we held that to be considered a supervisor, "the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." *Joens*, 354 F.3d at 940. *See also Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004). Gibbins, as foreman, could not hire, fire, or promote the laborers, nor could he assign them to a different job site. Patires possessed this authority and although he may have consulted with Gibbins on such matters, the record is clear that Gibbins lacked any such authority. *Cf. Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 747, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) (where the alleged harasser was "a midlevel manager[,] . . . was a vice president in one of five business units[, and] . . . had authority to make hiring and promotion decisions subject to the approval of his supervisor"); *Faragher*, 524 U.S. at 807 (discussing vicarious liability of the employer for harassment by a supervisor "with immediate (or successively higher) authority over the employee"). The fact that Patires was not present at the Honeywell site is irrelevant under the definition of supervisor established in *Joens*. Finally, Cheshewalla's

belief that Gibbins possessed the authority of a supervisor does not alter our conclusion in this case. *See Weyers*, 359 F.3d at 1057 n.7 (noting that the alleged harasser's "apparent authority would be an insufficient basis to support a finding of supervisor status").

Because Gibbins is considered a co-worker under the test set forth in *Joens*, Cheshewalla's claim is without merit unless she can demonstrate that Rand knew or should have known of the harassment and failed to take proper remedial action. *See Dyne*, 184 F.3d at 987. The record demonstrates that Rand attempted to determine at the outset what, if any, harassment was ongoing by requiring Christian to investigate and then took remedial action by reassigning Gibbins to another job site solely on the basis of an anonymous telephone call. Christian contacted the female laborers at the Honeywell site and told them they could call her at work or at home. Christian encouraged Cheshewalla to speak with her, telling Cheshewalla that she would not be fired for speaking to her. In January 2001, Christian learned, after considerable effort, that Gibbins was reportedly harassing Cheshewalla and it was then that Christian and Williams received this information from Cheshewalla. Gibbins was permanently transferred from the Honeywell site on the basis of the reports, before Cheshewalla had confirmed the reports directly. Moreover, Cheshewalla did not report any harassment occurring after January 11, when Christian was first alerted that it was in fact Cheshewalla who was being harassed. Cheshewalla has not made any of the showings required in order for her to prevail on this issue.

III.

Cheshewalla further claims that Rand retaliated against her for reporting that Gibbins sexually harassed her. To make

out a prima facie case of retaliation under Title VII, Cheshewalla must show that: (1) she engaged in statutorily protected conduct; (2) there was an adverse employment action; and (3) a causal connection exists between this conduct and the adverse action. *Sallis v. University of Minn.*, 408 F.3d 470, 477 (8th Cir. 2005). The first two elements are established by Cheshewalla's complaint to Christian and others, and her layoff. A material issue of fact has not been raised, however, with regard to a causal connection between Cheshewalla's complaints and her layoff.

Cheshewalla has supplied no evidence of retaliation other than the fact that she was laid off exactly one month after reporting that Gibbins had sexually harassed her. The four-week interval between Cheshewalla's complaint and her layoff is insufficient to establish a showing of causal connection, given the other facts of this case. We have held that "generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation," *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc), although in some cases we have held close temporal proximity to be sufficient as a matter of law to demonstrate causal connection. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Two events that occurred between the protected conduct and the layoff bring this case within the reach of *Kiel*. Cheshewalla missed many days of work and was in fact laid off on a day when she was skipping work, and Rand was undergoing a period of layoffs and reduced work availability. We conclude here, as we did in *Kiel*, that the intervening events "eroded any causal connection" suggested by the temporal proximity of Cheshewalla's protected conduct and her layoff. 169 F.3d at 1136. With regard to the reduction in the workforce that had been ongoing in the weeks before Cheshewalla was laid off,

company policy dictated that uncleared laborers, such as Cheshewalla, should be the first types of employees to be laid off. Moreover, Rand evinced a willingness to transfer Gibbins to another job site, the first time on an anonymous tip, and the second time on more reliable information. Without any evidence of retaliation, it simply does not follow that Rand would take all appropriate actions (e.g., transferring Gibbins), wait a month, and then decide to lay off Cheshewalla in retaliation for her complaint. Under these circumstances, temporal proximity alone does not allow Cheshewalla to prevail, because no reasonable jury could conclude from this scant evidence that Rand had retaliated against her.

Whether we cabin our examination of these intervening events under the third element of the prima facie case or under the subsequent step of the defendant's legitimate, nondiscriminatory reason for its actions, *see Peterson v. Scott County*, 406 F.3d 515, 524 (8th Cir. 2005), the result is the same.

The fact that Cheshewalla was not later rehired when Rand had work to offer does not raise an issue of material fact. No explanation need be given for the failure to rehire an employee who was laid off on the day of her ninth absence from work within a short period of time. Regardless of whether Cheshewalla's departure was labeled a layoff or a termination, no causal connection between the protected activity and adverse employment action has been shown.

IV.

Michaels and Petkoff allege that Rand retaliated against them for reporting that Gibbins was sexually harassing Cheshewalla. Neither the plaintiffs' brief nor the district court's opinion addresses the element of causal connection

required to make out a prima facie case of retaliation. Based upon our review of the record, we find their claims too attenuated to withstand summary judgment, for there is a notable absence of any evidence tying their reports of sexual harassment to their layoffs and subsequent predicament of not being rehired.[2] As with Cheshewalla, there is a relatively close temporal proximity between their protected conduct and their layoffs. Yet again, this appears to be a mere coincidence, as the usual January reduction in force was ongoing and plaintiffs' red badge status dictated that they be disfavored in the process. Michaels's and Petkoff's disfavored status notwithstanding, three journeymen carpenters had already been laid off before January 29, 2001.

The district court's thorough analysis of why Rand's rationales for laying off and not rehiring Michaels and Petkoff are not pretexts would make their claims unavailing had a prima facie case been made out. We conclude, however, that such an analysis is unnecessary, given that the plaintiffs have not carried their initial burden in this regard.

The judgment is affirmed.

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[2] We have considered plaintiffs' contention that Franks's response to a question constituted evidence of retaliation and conclude that it is without merit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Case 4:03-cv-00135-ODS

[Filed July 20, 2004]

Monika Cheshewalla, Aaron Paul Michaels, Robert J. Petkoff, Appellants,	)
v.	)
Rand & Son Construction Company, Appellee.	)

ORDER GRANTING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Pending are three Motions for Summary Judgment. All three are granted, and judgment is entered in Defendant's favor on all claims.

I. INTRODUCTION

Plaintiff Monika Cheshewalla asserts that she was sexually harassed by her foreman, Michael Gibbins, and subjected to

retaliation when she complained. Plaintiffs Aaron Michaels and Robert Petkoff allege they were discharged in retaliation for their support of Cheshewalla, including providing testimony to the EEOC during the course of its investigation. Defendant filed three motions for summary judgment, each addressing a different plaintiff's claims. Defendant and Plaintiffs (particularly Defendant) spend an inordinate amount of effort trying to persuade the Court that one or another of various parties/witnesses are lying, concocting schemes, or are otherwise unworthy of belief.[1] Whatever thoughts the Court may have about the veracity of a witness or a particular statement is completely irrelevant. Once a witness is willing to make a statement under oath - be it in an affidavit or deposition - the Court is to presume the witness will make a similar statement under oath to a jury. The believability of that statement is the exclusive province of the jury, not the Court.

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See generally Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson*

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[1] The most egregious example appears in the introduction to Defendant's Reply Suggestions regarding Cheshewalla. Defendant's innuendo and character attacks might be appropriate in a closing argument in front of the factfinder; here, however, the Court is not making findings of fact so the effort is inappropriate. (However, the undersigned did chuckle at Defendant's assertion that it has no motive to lie - as if avoiding a judgment is not as much of a motive as a plaintiff's desire to win a judgment).

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *see also Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992). In applying this standard, the Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984), *cert. denied*, 470 U.S. 1057 (1985). However, a party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of the... pleadings, but.., by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

II. DISCUSSION

A. Cheshewalla's Claim of Sexual Harassment

With these principles in mind, the Court first addresses Cheshewalla's claim of sexual harassment. To establish a hostile work environment claim, the plaintiff must, at a minimum, "show that she was subjected to unwelcome sex-based harassment that was sufficiently severe or pervasive to alter a term, condition, or privilege of her employment." *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). The harassing conduct must have been both subjectively and objectively offensive. *Erenberq v. Methodist Hosp.*, 357 F.3d 787, 792 (8th Cir. 2004). The Court concludes there are disputed issues of material fact that preclude entry of summary judgment on any of these issues.

Assuming a plaintiff can establish these elements, the remainder of the case depends on whether or not the alleged harasser was a supervisor. If the harasser is a co-worker, the

plaintiff must demonstrate the employer "knew or should have known of the conduct and failed to take proper remedial action." *Dyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 987 (8th Cir. 1999). On the other hand, if the harassment was committed by a supervisor, the employer is vicariously liable unless it can establish the affirmative defense defined in *Burlinqton Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). These cases hold that "[w]here the plaintiff suffers no tangible employment action the employer is entitled to establish by a preponderance of the evidence an affirmative defense consisting of two elements: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1006 (8th Cir. 2000) (citing *Ellerth*, 524 U.S. at 764-65 and *Faragher*, 524 U.S. at 807-08). Analysis of the remainder of Cheshewalla's case requires examination of Gibbins' status.

Defendant is a construction company that regularly provides construction services for, among others, Allied Honeywell ("Honeywell"). There were two projects at Honeywell: the maintenance project and the "SMRI" project. Most workers were assigned to one of the other projects; Plaintiffs were assigned to the maintenance project. Most of Defendant's employees working at Honeywell are either carpenters or laborers and are members of the appropriate unions. Cheshewalla was hired as a laborer in August 2000. Michael Gibbins was the foreman for the laborers at the Honeywell facility since approximately 1995, and Danny Franks was the carpenters' foreman. Ernie Patires was Defendant's Vice President; he was also the project manager for the Honeywell work site but was not there physically.

Dave Burke was the superintendent, or lead foreman, at the site, and was situated above Franks and Gibbins in the chain of command. He was located at the site. As the carpenters' foreman, Franks provided Gibbins with direction as to what work needed to be performed by the laborers. Patires Depo. at 11. Cheshewalla's protestations aside, the record is clear that Gibbins did not have authority to hire, fire, or promote laborers. Similarly, he lacked the authority to assign them to a different job site; this authority belonged only to Patires. Patires Affidavit, ¶¶ 3, 35-37; Patires Depo. at 13; Christian Depo. at 51; Gibbins Depo. at 87; Franks Depo. at 23-24. "[T]o be a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." *Joens*, 354 F.3d at 940.

Cheshewalla emphasizes that Patires did not work at the Honeywell site and relied on input from supervisors, including Gibbins.[2] This is undoubtedly true; however, this does not change the fact that Gibbins did not have the authority to make tangible employment decisions. *Joens* expressly rejected a more liberal definition of supervisor, declining to follow the Second Circuit's holding that a person who lacks the power to take tangible employment action is a supervisor if he or she has authority to direct the employee's daily activities. *Id.* The Eighth Circuit reiterated its rejection of a broad definition in *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004). There, the harasser assigned the plaintiff to particular tasks (although not to significantly different tasks), signed performance evaluations, and provided

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[2] There is a factual dispute as to whether Patires obtained Gibbins' input or only obtained input from Burke.

information that was relied upon by the decision maker when the plaintiff's employment was terminated. Nonetheless, the harasser lacked the authority to hire, fire, or take other tangible employment action, so he was not considered a supervisor. 359 F.3d at 1057. Cheshewalla also points to her belief in Gibbins' allegations that he could arrange for her friends (and her) to be laid off, but *Weyers* reiterates that supervisory status cannot be created based on apparent authority. *Id.* at 1057 n.7 (citing *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999)).[3] Consequently, Gibbins was not a supervisor.

Concluding Gibbins was not a supervisor within the meaning of the *Ellerth/Faragher* defense does not end the inquiry. As stated, Cheshewalla can still prevail if she can demonstrate Defendant knew or should have known of the harassment and failed to respond appropriately. Construed in the light most favorable to Cheshewalla, the record demonstrates the alleged harassment began shortly after she commenced employment in August 2000. The record establishes that on November 3, 2000, two female employees from Honeywell contacted Defendant's EEO Officer, Linda Christian, and reported that they heard a rumor that one of Defendant's employees was exposing himself to other women. Further discussions revealed to Christian that the woman who was being flashed was probably Cheshewalla, but Christian contacted all four female laborers working at Honeywell. Cheshewalla denied having any information and expressed fear that by talking to Christian she risked being fired; Christian assured Cheshewalla that she would not be fired for

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[3] Defendant also correctly points out that agency principles require some act by the employer to create apparent authority; an individual cannot create his own apparent authority.

speaking with her. Cheshewalla's Depo. at 171-73; Christian Depo. at 66-69; 73-74. Having not received information from any woman declaring they observed anyone exposing themselves (and not knowing who it was that was doing the exposing), Christian closed the file on November 16 until more information was obtained.[4]

On or about December 19, 2000, Christian received an anonymous phone call from a man who declared that Gibbins was harassing women. The caller did not indicate which women were being harassed, nor did he indicate what Gibbins was doing that constituted harassment. Nonetheless, Gibbons was transferred later that day to another job site. Christian Depo. at 86; Burke Depo. at 16-17.

After Christmas of that year, Cheshewalla had separate conversations with Burke and Christian; the content of these conversations is in dispute. Cheshewalla contends that Burke told her he wanted his friend (Gibbins) back, and that she complained to Christian that people were blaming her for Gibbins' transfer. Defendant contends Cheshewalla complained about Gibbins' transfer and asked that he be returned to the Honeywell site. The Court cannot and will not resolve this factual dispute. For her part, Cheshewalla points to Christian's notes of their conversation to demonstrate the knowledge Defendant possessed, but the notes do not indicate that Gibbons (or any other particular individual) engaged in misconduct, and actually recorded Cheshewallas's insinuation that a different employee was harassing her.

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[4] Cheshewalla contends this fact is controverted, but relies on events that occurred after November 16, which obviously could not have added to the information possessed by Christian on that date.

On or around January 8, 2001, Gibbins returned to work at the Honeywell site. Cheshewalla testified that upon his return he grabbed her arm and screamed at her, complaining that she was trying to ruin him. On January 11, Christian learned that Cheshewalla had been telling co-workers that Gibbins had been asking her for a date, and that she was riding to work with Gibbins. Later that day, Gibbins initiated contact with Christian and reported hearing rumors that he had sexually harassed Cheshewalla. The next morning, co-Plaintiff Petkoff confronted Gibbins about his treatment of Cheshewalla. Ninety minutes later, Christian learned of a phone call from the labor union's business agent (Les Williams) relating that Cheshewalla reported Gibbins had been touching her inappropriately. Williams attempted to convene a meeting of all people involved (including supposed eyewitnesses) but Cheshewalla did not attend. Nonetheless, Gibbins was transferred from the Honeywell facility and never returned.

After several efforts, Cheshewalla, Christian and Patires met on January 16. Cheshewalla admitted that Gibbins had been harassing her but would not provide specifics. Additional information came to light in the ensuing weeks, culminating on January 25 with Cheshewalla's verbal rendition of specific incidents.

The critical point is: Cheshewalla has not indicated that any sexually harassing conduct occurred after January 11 - the date Christian first obtained information providing her with a reason to know Cheshewalla was being harassed and the date Burke learned Gibbins had been asking Cheshewalla for a date. Plaintiffs have obfuscated this fact by presenting all of the events together in a non-chronological order and without any indication as to when the events occurred, thereby making it appear as if some of the harassment occurred right

up to the last day of Cheshewalla's employment and that supervisors and officials possessed information long before they actually did.[5] In emphasizing what people knew and ignoring when they knew it, Plaintiffs create the false impression that management level employees were aware of Gibbins misconduct from its inception. The record conclusively establishes that Defendant did not know or have reason to know Cheshewalla was being harassed by Gibbins until sometime in January 2001, and that no harassment occurred after that date.

Information possessed by Defendant on November 3 was only enough to raise a suspicion that Cheshewalla was harassed, which justified an investigation and an interview of Cheshewalla. Instead of confirming that she was being harassed Cheshewalla denied that she was being flashed. At this point, Defendant had no victim willing to complain and no transgressor identified; there was nothing more that could be done. The anonymous phone call in December did not provide a wealth of information to investigate, and Gibbins was moved to another site in any event. There is no indication Defendant knew about the January 8 incident until well after it occurred. At best, many of Cheshewalla's co-workers knew (including the other two Plaintiffs), as did some of Honeywell's employees (including the guards, with whom Cheshewalla often conversed), but this did not give Defendant a reason to know that anything was amiss.

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[5] One of the many examples is replicated here. Paragraph 15(a)(1) of Plaintiffs' Statement of Uncontroverted Facts states that Burke knew Gibbins had been asking Cheshewalla for a date and refers to pages 46-48 of Burke's deposition as support for this proposition. Those portions of the deposition establish that Burke obtained this knowledge on or about January 11, 2001.

Cheshewalla also emphasizes her fear over being laid off and her experiences with other employers. The latter is obviously of no consequence; Cheshewalla's prior experiences with other employers do not obviate the legal requirement for asserting a cause of action against *this* employer. As for Gibbins' threats, the Court accepts (as it must) that Cheshewalla genuinely thought Gibbins would arrange for her to be laid off-however, this fact also does not obviate the legal requirement which, after all, was originally created in order to limit employers' liability for misconduct of which they were unaware and had no opportunity to cure. *E.g., Whitmore v. O'Connor Mgmt. Co,* 156 F.3d 796, 800 (8th Cir. 1998).

B. Cheshewalla's Claim of Retaliation

"To establish a prima facie case of retaliation under Title VII, a plaintiff must show: (1) that she engaged in protected activity; (2) that adverse employment action occurred; and (3) a causal connection between the two." *Kobrin v. University of Minnesota*, 34 F.3d 698, 704 (8th Cir. 1994). Once the prima facie case has been established, the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason for its actions," at which point the burden shifts to the plaintiff to demonstrate that the employer's reasons are pretextual. *Id.* "The requisite causal connection may be proved circumstantially by proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive." *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992). For the sake of argument the Court assumes Cheshewalla has established a prima facie case of retaliation, which requires consideration of Defendant's reasons for terminating her employment and her allegations that the reasons are pretextual.

The circumstances surrounding Cheshewalla being laid off involves the confluence of two issues. The first stems from the fact that Honeywell is a defense contractor for the United States Government, and security measures required all of Defendant's employees to have a badge. There were three types of badges: red, yellow and blue. Workers with red badges were "uncleared" or "unsecured" and had to be accompanied by security guards. Workers with yellow or blue badges were "cleared" or "secured." Obtaining a yellow or blue badge required the approval of the Department of Energy ("DOE"), which also prepared the forms required to apply for the requisite approval. May Affidavit, ¶¶ 6-7. The process for obtaining security clearance started with the subcontractor (here, Defendant), who would make a request to one of Honeywell's purchasing agents. The purchasing agent provided the necessary forms to the individual employee, who was responsible for completing the forms and returning them to Honeywell. A personnel specialist from Honeywell reviewed the application and, if the application was complete, forwarded the application to the DOE. The employee is not supposed to submit the form to his/her employer or to the DOE. May Affidavit, ¶ 7. The entire process can take up to eighteen months. Patires Affidavit, ¶ 14.[6] When an employee with a pending application stopped working, Honeywell notified the DOE so the process could be aborted.

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[6] Plaintiffs attempt to controvert this fact. Plaintiffs have established that the time for getting the application packet from Honeywell can be rather quick, but nothing in the record disputes that the entire process, including the DOE's review, can take up to a year and a half. Plaintiffs also have not explained how Defendant's vague representation that the process would be quick is meaningful, given Defendant's lack of involvement in the process.

Honeywell maintained records documenting (1) when a subcontractor requested an application packet for a particular employee and (2) when a completed application was submitted to DOE. May Affidavit, ¶ 7. Honeywell's records indicate Defendant requested an application packet for Cheshewalla on October 13, 2000, but Honeywell never submitted a completed application on her behalf to DOE. May Affidavit, ¶ 10. Plaintiff blames Defendant for her application's non-submission, contending she gave the completed form to Gibbins who (as part of his harassing conduct) failed to submit it for processing. However, Plaintiff ignores the undisputed fact that she was supposed to submit the form directly to Honeywell. Regardless, Plaintiff had a red badge during her entire tenure with Plaintiff.

The second factor stems from the cyclical nature of Defendant's workload. While Defendant performed work for Honeywell regularly and nearly constantly, the work was cyclical. There was less work to be done in the winter, particularly at the beginning of the year, because of the timing of the Government's payments on its contracts. At times, the low point in the cycle necessitated layoffs.[7] When layoffs were required, Honeywell preferred Defendant keep employees with blue or yellow badges. Hageman Affidavit,

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[7] Plaintiffs attempt to controvert this fact by pointing out that certain employees were never laid off. Obviously, this does not establish that the workforce was not trimmed often; it only establishes that there are some employees who had never been laid off. Plaintiffs also dispute Defendant's contention that layoffs were common, but this fact is irrelevant. Whether layoffs were historically common does not affect the need for layoffs on this occasion, nor does it refute that layoffs were actually occurring on this occasion.

¶ 7; Patires Affidavit, ¶ 19; Franks Depo. at 23; Christian Depo. at 223-24; Burke Depo. at 35.[8]

Layoffs were required on the maintenance project beginning in late January of 2001. Cheshewalla did not come to work on January 30 and 31 and February 1, 2, 7, 8, 9, 15 and 16. On February 16, Patires called Cheshewalla and told her that she had been laid off. There are many facts surrounding Cheshewalla's selection for layoff that are either disputed or simply not clear on the present record. However, these disputes (which are discussed below) are irrelevant to the present inquiry. There is no dispute that (1) layoffs were required, (2) uncleared laborers were the preferred choice for those layoffs and (3) Cheshewalla was not coming to work. These facts qualify as legitimate, non-discriminatory reasons for Defendant's decision.

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[8] Plaintiffs attempt to controvert this fact by pointing to Exhibit 19, which is an e-mail from Honeywell reflecting the policy that non-cleared employees should be laid off before cleared employees and that when a Defendant retained "a non-cleared craftsperson and released a cleared craftsperson of the same discipline there is an expectation that an explanation for such action be shared with" Honeywell. The e-mail is dated February 23, 2001; which is one week after Cheshewalla was laid off; from this, Plaintiffs conclude Honeywell's policy did not exist when Cheshewalla was laid off. The e-mail does not indicate whether it is announcing a new policy regarding preferences in laying off workers, announcing a new policy regarding communicating with Honeywell when a cleared employee is laid off in favor of an uncleared employee, or simply reminding Defendant of one or the other of the policies.

Cheshewalla does not seriously dispute these facts, but attempts to create other factual disputes in an effort to demonstrate her selection for layoff was a pretext for retaliation. She does not deny missing work on the days listed above, but contends she called on those days. Whether she called or not, the fact remains that she was missing work. She also contends that she missed work because Gibbins had her car and, as part of the harassment, co-workers would not provide her with transportation. The record does not establish that Gibbins had her car at this time, but even so neither Defendant nor its employees are required to provide her with transportation. Defendant could legitimately consider her absence as a factor in deciding whether to select her for layoff. Cheshewalla also discounts her absences by contending Defendant never presented them as a reason for her layoff until this lawsuit was filed, but this is not a fair reading of the record. When asked why Cheshewalla was terminated, Defendant's answer has consistently been that she was laid off. Rarely, however, has the underlying question been asked; namely, why was Cheshewalla selected to be one of those laid off? The answer, as discussed above, involves a combination of factors, all of which are legitimate.[9] Finally, Cheshewalla contends other red badge laborers were still working when she was laid off; the record is not clear on this point so the Court will presume this fact to be true. However, she has not demonstrated she was similarly situated to those employees because there is no indication those other employees were not coming to work.

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[9] Moreover, Cheshewalla relies heavily on Burke's testimony, but Burke did not make the decision to lay her off. Burke Depo. at 24-25.

Plaintiffs also find it significant that they were not called back to work when the workload increased.[10] They point to several employees who were called back, but those employees (1) were carpenters with special skills, (2) were foremen or supervisors, or (2) had a blue badge, meaning they could return to the site as cleared employees without having to wait for the DOE's review process. Regarding Cheshewalla specifically, there is no indication Defendant ever solicited the return of an uncleared laborer who missed work nine days out of a two week period immediately before being laid off and the failure to call her back does not demonstrate Rand's initial decision to lay her off was a pretext for retaliation.[11]

C. Michaels' Claim of Retaliation

Michaels was hired on or about July 17, 2000 as an uncleared carpenter apprentice. Rand's agreement with the union required it to employ at least two journeymen carpenters for every apprentice. Michaels was laid off on January 29, 2001, but not until Defendant had already laid off three journeymen carpenters (Jason Smith, Jeff Barr and Tim Paul), all of whom had red badges. When Michaels was laid

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[10] All Plaintiffs also contend they could have been transferred to another project, but present no evidence work was available at another project.

[11] It must be remembered that Plaintiffs do not assert an independent claim based on Defendant's failure to rehire them; the failure to rehire is offered as proof of pretext in the initial decision to include them in the layoff.

off, there were three red badge journeyman carpenters remaining and no red badge apprentices.[12]

The workload continued to diminish to the point that, between the time Michaels was laid off and April 5, 2001, two more red badge journeymen and one blue badge journeyman was laid off. The only carpenters left either (1) had blue badges, (2) had specialized skills (such as welding or refrigeration), or (3) were traveling superintendents. Patires Affidavit, ¶ 32.[13]

As with Cheshewalla, for the sake of argument the Court will assume Michaels has established a prima facie case of retaliation. Defendant has presented a legitimate, non-retaliatory reason for its decision to lay him off: the workload was diminishing, and Michaels was a red badged apprentice who did not possess special skills.

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[12] Part of this sentence is supported by paragraph 27 of Defendant's Statement of Uncontroverted Facts, which Plaintiffs admitted. The remainder is derived from paragraph 25 of Patires' Affidavit. Plaintiffs dispute this fact by relying on Exhibit 14, but Plaintiffs have not explained the origin of this exhibit (although it does bear a Bates stamp numbers, suggesting it was provided by Defendant). In any event, the exhibit does not show which carpenters were apprentices and which were journeymen, so the exhibit does not contradict Patires' sworn statement. Plaintiff is also not particularly attentive to the fact that some people worked on the SMRI project and not the maintenance project like the Plaintiffs.

[13] Michaels contends he could weld "under the watchful eye of a journeyman." Michaels Depo. at 92. This does not establish that he could weld; his own testimony establishes that two employees were required for him to weld: himself and a journeyman. This does not make him a skilled welder.

The record contains no evidence of pretext. Michaels also relies on the fact that he was not called back, and while carpenters were occasionally called back Michaels did not have special skills or a blue badge and was not a foreman or supervisor. Moreover, he was not a journeyman: a critical point because during the layoff Defendant had been forced to layoff journeymen, so it was obligated to rehire journeymen in order to comply with its agreement with the union to maintain a 2:1 ratio of journeymen to apprentices.

D. Petkoff's Claim of Retaliation

The facts and analysis surrounding Petkoff's claim are similar to those discussed above with respect to Michaels' claim, with a few exceptions. Defendant originally hired Petkoff in October 1997 as a journeyman carpenter to work at a completely different work site. He was laid off less than three months later due to a lack of work. He was rehired on October 31, 2000 as a red badge journeyman carpenter to work at the Honeywell site. There is a dispute as to whether Petkoff contacted Defendant directly or whether Defendant contacted the union hall, which then directed Petkoff to Defendant. Either way, the parties agree that Defendant did not contact Petkoff directly or otherwise solicit him specifically.

As a journeyman, Petkoff was undoubtedly "more preferred" than apprentice carpenters (including Michaels). However, he was uncleared, and his layoff would have truncated his application for a blue badge. Consequently, (1) he was not preferred over blue badge journeymen and (2) there was no particular reason to seek him out when the workload increased. Nothing in the record would permit a jury to conclude Petkoff was laid off in retaliation for his support of Cheshewalla.

III. CONCLUSION

For these reasons, Defendant's Motions for Summary Judgment are granted.

IT IS SO ORDERED.

DATE: July 20, 2004

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

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No. 05-494

Supreme Court, U.S.
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In The
Supreme Court of the United States

MONIKA CHESHEWALLA, ROBERT J. PETKOFF, AND AARON PAUL MICHAELS,

Petitioners,

v.

RAND & SON CONSTRUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT RAND & SON CONSTRUCTION COMPANY

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QUESTIONS PRESENTED

1. Can an employer escape vicarious liability for sexual harassment committed by a female worker's direct boss and immediate superior in the chain of command by reserving the actual power to hire and fire to an officer in the home office who never comes into contact with female workers on the basis that the direct boss is not a "supervisor" for purposes of Title VII?

2. May the court of appeals disregard the precedent of this Honorable Court recognizing that vicarious liability for sexual harassment may also be predicated on the harasser's apparent authority to take tangible employment action against the victim?

LIST OF PARTIES

Petitioners are Monika Cheshewalla, Robert J. Petkoff, and Aaron P. Michaels.

Respondent on this brief is Rand & Son Construction Company. Rand & Son Construction Company has no parent corporation, no subsidiaries and has no affiliates that have issued shares to the public.

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OPINIONS BELOW

The decision of the court of appeals is reported at 415 F.3d 847 (8th Cir. 2005) and is included in Appendix A to the Petition at pp. 1a-9a. The decision of the district court is unreported and is included in Appendix B to the Petition at pp. 10a-27a.

STATEMENT OF JURISDICTION

The decision of the court of appeals and judgment were entered on July 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42. U.S.C. § 2000e-2(a) provides as follows:

> (a) Employer practices. It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

STATEMENT OF THE CASE

This case involves claims by Monika Cheshewalla that she was sexually harassed by a coworker, Michael Gibbins, and subjected to retaliation when she complained. Aaron Michaels and Robert Petkoff also asserted retaliation claims alleging that they were laid off as a result of their reporting the sexual harassment. The district court granted summary judgment in favor of Rand on all claims. The court of appeals affirmed.

The record in this case conclusively establishes that Rand & Son Construction Company ("Rand") took timely, effective and appropriate actions when information regarding alleged sexual harassment was communicated to it. Rand immediately started an investigation when it first heard of any problem related to Cheshewalla. Rand initially removed Gibbins from the workplace based only on an anonymous report, and permanently removed Gibbins from the workplace when Rand finally learned from Cheshewalla's union representative that she claimed he was harassing her in January 2001. The record definitively establishes that: (1) Gibbins was not Cheshewalla's supervisor; (2) Rand did not know or have reason to know Cheshewalla was allegedly being harassed by Gibbins until sometime in January 2001; and (3) when Cheshewalla finally named Gibbins as her alleged harasser to her union representative, Rand permanently removed him from the workplace and no alleged harassment occurred after that date. The record further shows that the subsequent layoffs of the Petitioners were proper due to work shortages and Cheshewalla's failure to show up for work and thus not pretextual.

Indeed, rather than providing a roadmap for how to vitiate a duty to avoid sexual harassment, as Respondents contend, Rand's actions demonstrate how a conscientious employer handles allegations of sexual harassment. In their Statement of the Case, Petitioners include a lengthy factual recitation nearly identical to those contained in their briefing to the court of appeals and the district court. This recitation is not supported by the record, is inflammatory, is misleading, and has been rejected by both the district court and the court of appeals. As the district court noted in its Order granting Rand's motions for summary judgment, the Respondents' factual recitations obfuscate material facts "by presenting all of the events together in a

non-chronological order and without any indication as to when the events occurred, thereby making it appear as if some of the harassment occurred right up to the last day of Cheshewalla's employment and that supervisors and officials possessed information long before they actually did. In emphasizing what people knew and ignoring when they knew it, Plaintiff create the false impression that management level employees were aware of Gibbins misconduct from its inception. The record conclusively establishes that Defendant did not know or have reason to know Cheshewalla was being harassed by Gibbins until sometime in January 2001, and that no harassment occurred after that date." See Exhibit B to Petition at pp. 17a-18a.

Pursuant to Supreme Court Rule 15.2, Respondent is obligated to address any misstatement of facts contained in the Petition. A properly supported recitation of facts, which has effectively been adopted by the district court and the court of appeals, follows.

Rand & Son Construction Company ("Rand") is a subcontractor of and has a long-standing relationship with Allied Honeywell ("Honeywell"). Honeywell is a defense contractor with the federal government. Rand provides construction services at the Honeywell plant located in Kansas City, Missouri (the "Maintenance jobsite"). JA 16 (Complaint ¶¶ 23-25).[1] Michael Gibbins had been employed at the Maintenance jobsite since approximately 1995. JA 161 (Patires Affidavit ¶ 35).

Due to the secured nature of the Honeywell plant, all Rand employees who work at the Maintenance jobsite must have a "badge." JA 158 (Patires Affidavit ¶ 10).

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[1] Citations in the form "JA__" refer to the Joint Appendix filed in the court of appeals.

There are three types of badges: red badges, yellow badges, and blue badges. JA 1118 (Michaels Depo. 37:3-12). Red badge workers are considered "uncleared" or "unsecured" and must be accompanied around the plant by security guards or blue badge employees. JA 1118 (Michaels Depo. 37:20-38:13). Yellow and blue badge workers are "cleared" or "secured." JA 158 (Patires Affidavit ¶ 11). In order to become a yellow or blue badge, the employee must fill out an application and be approved by Honeywell. JA 158 (Patires Affidavit ¶ 13). The process of obtaining a blue badge is lengthy; it can take up to a year and a half. JA 158 (Patires Affidavit ¶ 13-14); JA 961 (Franks Depo. 23:3-20). While he worked at the Honeywell facility, Gibbins carried a blue badge. JA 161 (Patires Affidavit ¶ 35).

On or about August 22, 2000, Rand hired Monika Cheshewalla as a laborer for the Honeywell facility. JA 1046 (Cheshewalla Depo. 74:15-17). Cheshewalla carried a red badge. JA 158 (Patires Affidavit ¶ 9). Gibbins was Cheshewalla's laborer foreman from August 22 through approximately December 2000. JA 161 (Patires Affidavit ¶ 35); JA 1050 (Cheshewalla Depo. 91:23-25). Gibbins did not have the authority to hire, fire, or layoff any laborers, including Cheshewalla. JA 161 (Patires Affidavit ¶ 35); JA 999 (Gibbins Depo. 87:24-88:1); JA 1015 (Patires Depo. 13:3-8).

Unknown to any management personnel at Rand, Gibbins and Cheshewalla had an intimate personal relationship. Cheshewalla and Gibbins had intercourse two or three times at his home. JA 990 (Gibbins Depo. 52:7-53:17); JA 1054 (Cheshewalla Depo. 107:2-7). Cheshewalla did not report the fact of her sexual relations with Gibbins to any Rand management personnel. JA 1054 (Cheshewalla Depo. 106:9-14). Cheshewalla and Gibbins also had a number of consensual meetings outside of work.

Included in these meetings was an instance in late September 2003 where Cheshewalla asked Gibbins to come to her home to repair a damaged retaining wall and an instance in the fall of 2000 where Cheshewalla and her nephew, Tony Parsons, arrived at Gibbins' home reporting that Cheshewalla's husband (from whom she was separated) had arrived drunk and that she was afraid to stay in her home. Cheshewalla proceeded to spend that night at Gibbins' home. JA 991 (Gibbins Depo. 56:24-57:2); JA 1007 (Gibbins Depo. 120:4-23). Subsequently, around Thanksgiving, Cheshewalla began a personal, sexual relationship with Petkoff, a co-petitioner in this case. JA 1073 (Cheshewalla Depo. 183:14-186:5).

On November 3, 2000, two women who worked for Honeywell contacted Rand's EEO Officer, Linda Christian, reporting that they heard that one of Rand's employees was exposing himself to other women. JA 913 (Christian Depo. 66:16-25). Christian notified Ken Hageman, the owner of Rand, about the call from the Honeywell employees. Hageman immediately authorized and instructed Christian to conduct an investigation. JA 750 (Hageman Affidavit ¶ 2). Hageman instructed Christian to talk to each and every female employee at Rand's Honeywell Maintenance and SMRI job sites to see what, if anything, was going on, or if any of them had any problems of any kind or had heard of anything. *Id.* Hageman further instructed Christian to take notes of everything that was discussed – whether the information was good or bad – and to keep a written record of her conversations. *Id.* Christian took meticulous notes of all her conversations regarding the investigation. JA 341-364.

From November 6 to November 9, 2000, Christian interviewed all of the women working for Rand at the Honeywell facility – including Cheshewalla. All of the

women denied observing anyone exposing himself. JA 341-343 (Christian Notes); JA 914 (Christian Depo. 69:5-8). The Honeywell employees that made the report had received information from an individual named Paulette, who owned a company that did business with Honeywell. JA 913 (Christian Depo. 67:4-22). Christian proceeded to contact Paulette to gather additional information. Paulette would not give any names at first, but after much insistence from Christian, Paulette stated that the person making the complaint was Cheshewalla. JA 913 (Christian Depo. 67:23-69:19). From her conversation with Paulette, Christian believed that Cheshewalla was the person complaining about being flashed, but Cheshewalla would not acknowledge having any information about the incident. JA 341-342 (Christian Notes); JA 913 (Christian Depo. 68:18-22; 69:9-16); JA 914 (Christian Depo. 71:8-17); JA 915 (Christian Depo. 74:1624). Since none of Rand female employees reported any problems at work during the interviews, and none of them verified that they had observed any individual exposing himself, Christian closed the file on the matter on November 16, 2000. JA 751 (Hageman Affidavit ¶ 3); JA 343 (Christian Notes).

On December 19, 2000, Christian received an anonymous telephone call from someone stating that Mike Gibbins had "stepped over the line" and was harassing someone. The caller did not identify Cheshewalla. JA 343 (Christian Notes); JA 915 (Christian Depo. 75:3-15). Following the anonymous call, Rand management immediately transferred Gibbins to another work location. JA 916 (Christian Depo. 78:5-11); JA 918 (Christian Depo. 86:10-15).

Gibbins returned to the Honeywell facility to attend the annual Christmas party on December 22, 2000. At that party, he announced to a group of people his plans to visit his children in Oklahoma at which time Cheshewalla

volunteered to lend Gibbins her car. JA 1005 (Gibbins Depo. 109:20-110:20).

On December 28, 2000, Cheshewalla made an appointment and came to see Christian about Gibbins. She complained that Gibbins had been sent away, stated that Gibbins was one of three men she "trusted," and begged for Gibbins to come back, thoroughly confusing Christian as to what, if anything, was going on because Christian suspected that the party allegedly being harassed was Cheshewalla. JA 921 (Christian Depo. 97:15-19); JA 939 (Christian Depo. 169:16-170:2). As a result of what Cheshewalla told Christian, on January 8, 2001, Gibbins returned to the Honeywell facility. JA 921 (Christian Depo. 97:5-19).

On January 12, 2001, Cheshewalla contacted Les Williams at the Laborer's Union Hall, making a verbal complaint that Gibbins was harassing her. Williams contacted Ernie Patires, Rand's Vice President and Project Manager, with this information. JA 162 (Patires Affidavit ¶ 43); JA 184 (Patires Notes); JA 347 (Christian Notes). Gibbins was immediately removed from the Honeywell facility, where he has never again been stationed. JA 103 (Gibbins Depo. 103:1-11). Gibbins was transferred to an outdoor, less attractive job. He also lost his blue badge. JA 162 (Patires Affidavit ¶¶ 44-45). Rand management also found out the day he was transferred that Gibbins had Cheshewalla's car (that he had previously borrowed) and forced him to return the car immediately. JA 1019 (Patires Depo. 32:24-33:7).

After Gibbins was transferred, Christian continued to interview a number of employees regarding the allegations of harassment. JA 190 (Christian Affidavit ¶ 9); JA 196-204 (Christian Notes). On January 18, 2001, Gibbins was interviewed and signed a statement denying that he had

any personal relationship with Cheshewalla, or that he had harassed her in any way. JA 205 (Christian Notes); JA 935 (Christian Depo. 151:3-11). Christian interviewed Cheshewalla numerous times and asked her to sign a statement about Gibbins. JA 1071 (Cheshewalla Depo. 176:23-177:10). Cheshewalla stalled the process and refused to sign a statement about any alleged conduct by Gibbins. JA 190 (Christian Affidavit ¶ 8).

Many other Rand employees were interviewed, and a number of them noted Cheshewalla's overly friendly, flirtatious attitude toward the men working at the Honeywell facility. JA 352 (Christian Notes); JA 845 (Williams Depo. 29:14-22); JA 937 (Christian Depo. 162:15-25); JA 862 (Josh Franks Depo. 37:21-38:2). One Rand employee even noted Cheshewalla's open comment to other coworkers that "I won't do you, you, and you" making a reference to having sexual intercourse with these coworkers. JA 352 (Christian Notes); JA 847 (Williams Depo. 39:14-41:17).

On January 25, 2001, Petkoff and Cheshewalla came in together and for the first time Cheshewalla made specific accusations to Rand against Gibbins. JA 205 (Christian Notes); JA 948 (Christian Depo. 206:14-19). By that time, Gibbins had been removed from the Honeywell Maintenance facility for nearly two weeks.

Rand's workload – particularly at government facilities – is cyclical in that the down cycle is manifest at the beginning of each year, as the funding for government contracts has yet to be received. JA 960 (Franks Depo. 19:9-21); JA 159 (Patires Affidavit ¶ 17). When workloads are low, layoffs are common. JA 961 (Franks Depo. 23:3-20); JA 159 (Patires Affidavit ¶ 17). When Rand is faced with a layoff of workers at the Honeywell facility, Honeywell has always demanded that every effort be made to retain blue badge workers over red badge workers. JA 159

(Patires Affidavit ¶ 19); JA 887 (Burke Depo. 35:15-17); JA 161 (Franks Depo. 22:5-8); JA 952 (Christian Depo. 223:24-224:5); JA 752 (Hageman Affidavit ¶ 7). In late January 2000 and into February, Rand was running quite low on work for laborers and carpenters and many were laid off. JA 159 (Patires Affidavit ¶¶ 20-34).

Ernie Patires, Rand's Vice President since approximately 1988, is responsible for the hiring, firing and laying off of carpenters, laborers, cement finishers, and operating engineers. JA 1015 (Patires Depo. 13:3-8); JA 884 (Burke Depo. 23:21-25). In determining who to lay off, Patires first seeks to retain blue badge employees over red badge employees in accordance with Honeywell's directive. JA 159 (Patires Affidavit ¶ 19); JA 887 (Burke Depo. 35:15-17); JA 752 (Hageman Affidavit ¶ 7). Patires solicits information from Rand's carpenter foreman, David Burke and superintendent Danny Franks, as to the specific labor needs remaining and the work situation. JA 1015 (Patires Depo. 13:9-14:7); JA 161 (Patires Affidavit ¶ 39). David Burke and Danny Franks are located at the Honeywell facility. JA 880 (Burke Depo. 6:22-25); JA 960 (Franks Depo. 17:25-18:4). Patires Depo. Patires also looks at work quality, supervisory skills and specialized skills in determining layoffs. JA 161 (Patires Affidavit ¶ 40).

On or about July 17, 2000, Aaron Michaels was hired as a carpenter apprentice at Rand's Honeywell jobsite. JA 189 (Christian Affidavit ¶ 3). As an apprentice, Michaels was "uncleared", and thus a "red badge" employee. JA 1118 (Michaels Depo. 37:3-14). Pursuant to the Joint Carpenter's Agreement negotiated by the Union, Rand must employ at least two journeyman carpenters to every apprentice. JA 159 (Patires Affidavit ¶ 15).

Robert Petkoff was first hired by Rand on October 7, 1997, as a journeyman carpenter to work at its Bayer

jobsite. JA 158 (Patires Affidavit ¶ 4). Petkoff was laid off on January 2, 1998, less than three months later, due to a lack of work. JA 158 (Patires Affidavit ¶ 5). Petkoff was rehired on October 31, 2000 as a red badge journeyman carpenter after he contacted Rand looking for work. JA 158 (Patires Affidavit ¶ 7).

Beginning in late January and continuing through February 2001, Cheshewalla missed numerous days of work and failed to call in or report that she would be off on a number of those days. Cheshewalla failed to call in and to show up for work on January 30, 31 and February 1, 2001. JA 190 (Christian Affidavit ¶ 15); JA 206-210 (Christian Notes). An employee who does not show up for work and who does not call in for three consecutive days is considered a voluntary quit. JA 951 (Christian Depo. 218:10-24). On February 2, 2001, Cheshewalla called and said she would be in late, but never reported to work. JA 191 (Christian Affidavit ¶ 16). On February 7, 2001, Cheshewalla did not report for work saying her "car needed repairs." JA 191 (Christian Affidavit ¶ 17). On February 8, 2001, Cheshewalla again called in and said she would not be in to work. JA 191 (Christian Affidavit ¶ 18). Cheshewalla did not call in and did not show up for work on February 9, 2001. JA 191 (Christian Affidavit ¶ 19). On February 15, 2001, Cheshewalla called in and said she would not be at work because "she couldn't get her car doors open." JA 191 (Christian Affidavit ¶ 20). On February 16, 2001, Cheshewalla called in and said she would not be at work because the "regulator" and "alternator" on her car needed to be replaced. Cheshewalla then inquired as to whether she still had a job. JA 191 (Christian Affidavit ¶ 21). That same day, Patires called Cheshewalla and told her she was laid off. JA 219 (Christian Depo. 219:12-24). At the time she was laid off,

Cheshewalla was the last laborer working at the Honeywell jobsite. JA 160 (Patires Affidavit ¶ 26). Cheshewalla acknowledges she was absent many days before she was laid off. JA 1072 (Cheshewalla Depo. 178:8-11).

In late December 2000, work got slow at the Honeywell facility and Rand laid off red badge journeyman carpenter Jason Smith. JA 159 (Patires Affidavit ¶ 20). Work continued to decline in January 2001 and on January 25, 2001, red badge journeyman carpenters Jeff Barr and Tim Paul were laid off. JA 160 (Patires Affidavit ¶ 21). On January 29, 2001, Patires laid off Michaels and Petkoff due to lack of work. JA 160 (Patires Affidavit ¶ 22). At the time Michaels was laid off, he was the last red badge carpenter apprentice still working for Rand at its Honeywell jobsite and no other red badge carpenter apprentices were retained at that time. JA 160 (Patires Affidavit ¶¶ 23-25). The only red badge journeyman carpenters remaining at Honeywell at the time Petkoff was laid off were Danny Chrisman, Robert Carpenter and Art Porter, all of whom had more seniority than Petkoff. JA 160 (Patires Affidavit ¶ 24). On or about February 8, 2001, red badge journeyman carpenter Danny Chrisman quit. JA 160 (Patires Affidavit ¶ 27). On or about February 14, 2001, John Coning was rehired by Rand as a blue badge superintendent carpenter to run work in other cities. JA 160 (Patires Affidavit ¶ 28). On or about February 26, 2001, red badge journeyman carpenter Rob Carpenter was laid off. JA 160 (Patires Affidavit ¶ 30). On or about April 5, 2001, the workload continued to decline and red badge journeyman carpenter Art Porter and blue badge journeyman carpenter Dennis Williams were laid off. JA 160 (Patires Affidavit ¶ 31). Work continued to decline and layoffs continued, such that by April 5, 2001, the only carpenters remaining were either blue badges, red badge journeyman carpenters with specialized skills such as

refrigeration, or those that were traveling superintendents. JA 161 (Patires Affidavit ¶ 32). No other carpenters were hired during this time period. JA 160 (Patires Affidavit ¶ 33). In fact, the workload dropped off so much that at one point there were only two blue badge carpenters, Danny Franks and Josh Franks, working at the Honeywell jobsite. JA 161 (Patires Affidavit ¶ 34).

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Eighth Circuit's Definition Of Who Is A Supervisor Properly Balances Agency Principles Of Vicarious Liability With Title VII's Goal Of Encouraging Proactive Resolution Of Workplace Harassment.

The Eighth Circuit has held that in order to be considered a supervisor such that vicarious liability would apply under Title VII, "the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." This definition of who is a supervisor properly balances agency principles of vicarious liability with Title VII's goal of encouraging proactive resolution of work place harassment and should not be disturbed.

One of the main purposes of Title VII is to encourage proactive resolution of workplace harassment. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court noted that the primary objective of Title VII was not to provide redress, but to avoid harm. *Faragher*, 524 U.S. at 806. This Court's stated goal in *Faragher/Ellerth* was to balance agency principals of vicarious liability with Title VII's goal of encouraging employers to promulgate and

enforce anti-discrimination/harassment policies and encouraging employees to avoid the harm caused by harassment and discrimination by promptly reporting such misconduct. *Id.* This Court stated that "[i]t would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive." *Id.*

Rand took its affirmative obligation to prevent violations of Title VII seriously. Rand promulgated a sexual harassment policy, disseminated that policy to all employees, and it was signed by each of the Petitioners in this case. JA 911 (Christian Depo. 59:2-12). Rand's sexual harassment policy was posted at the jobsite, and every January the policy was distributed to all employees with their paycheck. JA 911 (Christian Depo. 56:2-12); JA 858 (Franks Depo. 24:3-8). The complaint procedures within Rand's sexual harassment policy demonstrate Rand's reasonable care in preventing sexual harassment, as there are alternative methods of reporting sexual harassment other than through the harassing supervisor. JA 383 (Rand's Sexual Harassment Policy).

Not only did Rand have a comprehensive sexual harassment policy, but it acted diligently and thoroughly when confronted with incidents of potential sexual harassment. In the present case, Rand immediately started an investigation in November 2000 when it first heard of any potential problem (that being a rumor that a male employee had exposed himself). Rand investigated this rumor by interviewing every woman, including Cheshewalla, employed by Rand at any Honeywell jobsite.

No one reported any problems; thus, the investigation was closed. The next time Rand was aware of any potential harassment was when it received an anonymous telephone call on December 19, 2000. Rand restarted its investigation and again interviewed every Rand employee working at any Honeywell jobsite. More importantly, suspecting Cheshewalla might be the person allegedly harassed, Rand immediately took remedial action by transferring Gibbins (the name provided in the anonymous phone call) to another jobsite solely on the basis of the anonymous telephone call. After Cheshewalla told Rand (on December 28, 2000) that she was upset that Gibbins had been transferred because Gibbins was one of the three people she could trust, and begged for his return, Rand officials were confused and concluded that they did not have sufficient information to conclude Gibbins was guilty of anything. Therefore Rand permitted Gibbins to return to the Honeywell maintenance jobsite on January 8, 2001. Then, on January 12, 2001, Cheshewalla alleged to the union business agent that she had been sexually harassed by Gibbins. Gibbins was immediately and permanently transferred from the Honeywell maintenance jobsite on the basis of this report, even before Cheshewalla had confirmed the reports directly to Rand. Gibbins never returned to the Honeywell maintenance jobsite after that date and, moreover, Cheshewalla did not report any harassment occurring after that date when Christian was first alerted that it was *in fact* Cheshewalla who was allegedly being harassed by Gibbins. Gibbins lost his blue badge security clearance, and he was transferred to an outdoor, more onerous jobsite. In light of the foregoing, it cannot be disputed that Rand acted promptly and with reasonable care to correct the sexual harassment alleged by Cheshewalla.

In their Petition, Petitioners seek a broadening of the definition of a "supervisor" that is inconsistent with the policy rationale underlying Title VII and expressly relied upon by this Court: encouraging forethought on the part of employers and saving action by employees. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 805-06. The nebulous standard for determining which employees are supervisors advocated by Petitioners would create less incentive for companies to engage in preventative forethought. The definition sought by Petitioners would undermine the remedial purposes of Title VII were it to subject employers such as Rand to sexual harassment liability despite their prompt and effective action in investigating incidents and removing perpetrators from the workplace.

Ellerth and *Faragher* held that vicarious liability for an employee is automatic if a supervisor engages in sexually harassing conduct that culminates in a "tangible employment action." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. In *Ellerth*, this Court defined a "tangible employment action" as an action that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. This Court went on to describe a second class of cases where vicarious liability would apply. An employer will also be vicariously liable in situations where a supervisor has created an actionable hostile work environment but no tangible employment action is taken. *Id.* at 764-65. However, in these cases, liability is not automatic, but subject to an affirmative defense. An employer will avoid vicarious liability if it can show by a preponderance of the evidence that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) the plaintiff employee unreasonably failed to take advantage

of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at 765; *Faragher*, 524 U.S. at 807. Conversely, if the harasser is a co-employee of the victim, and not a supervisor, the employer does not face vicarious liability. Rather, a negligence standard is employed by which an employer will be liable if it knew or should have known of the conduct and failed to take proper remedial action. *Ellerth*, 524 U.S. at 759.

Ellerth and *Faragher* did not answer the question of who is a supervisor. However, *Ellerth* did explain that a supervisor is a person who has been empowered by the employer "as a distinct class of agent to make economic decisions affecting other employees under his or her control" and that "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762. *Ellerth* noted that such empowerment may significantly increase the supervisor's power to harass:

> A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor.

Id. (citations omitted).

The Eighth Circuit's definition of a supervisor utilized in this case is consistent with the language and rationale of *Ellerth* and is in accord with decisions of other circuit courts. In *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004), the court held that higher ranking co-workers who managed the employee's work assignments,

investigated complaints and disputes, and made recommendations concerning sanctions for rule violations, were not the employee's supervisors because they did not have authority to make any decisions affecting terms and conditions of the employee's employment, i.e., the authority to hire, fire, promote, demote, discipline or transfer her. *See also Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002). In *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005) the court agreed with the Seventh Circuit that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment and that this authority primarily consists of the "power to hire, fire, demote, promote, transfer or discipline an employee." In *Mikels v. City of Durham, N.C.*, 183 F.3d 323, 333-34 (4th Cir. 1999), the court held that occasional authority to direct operational conduct without the power to take tangible employment actions was not sufficient to establish supervisory status. *See also Church v. Maryland*, 53 Fed. Appx. 673 (4th Cir. 2002). In *Stevens v. U.S. Postal Service*, 21 Fed. Appx. 261 (6th Cir. 2001), the court held that a postal service employee who had only informal supervisory duties, but did not have the formal title of supervisor nor the power to hire or fire a postal clerk, was not the clerk's "supervisor" for purposes of a Title VII sexual harassment claim.

The Eighth Circuit definition of a supervisor (along with those of the other circuit courts listed above) is entirely consistent with the doctrine set forth in *Faragher* and *Ellerth*. This definition properly subjects employers to vicarious liability when harassment is conducted by an individual who has been empowered by an employer to take or bring about tangible employment actions against a victim. Imposing vicarious liability on employers for harassment committed by such empowered supervisors makes sense because the number of supervisors is limited

and therefore an employer can reasonably guard against their misbehavior. *Faragher*, 524 U.S. at 800-01. As this Court stated in *Faragher* "[r]ecognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity to screen them, train them, and monitor their performance." *Id.* at 803. Conversely, if the employee in question does not have the power to take a tangible employment action against a victim, the purposes of Title VII are best served by applying the co-worker negligence standard. This standard promotes the remedial provisions of Title VII by encouraging employers to establish and promote strong sexual harassment policies, and also encourages employees to take advantage of those policies and report instances of sexual harassment. Far from giving a free pass to any employer, as Petitioners contend, the co-worker standard properly punishes employers who know or should have known of the conduct in question and fail to take proper remedial action, while properly rewarding employers who establish a strong sexual harassment policy, are diligent in monitoring potential problems, and swiftly and decisively take proper remedial action when alerted to harassing situations.

The Eighth Circuit standard properly subjects employers to vicarious liability for the actions of supervisors whom employers have empowered with the ability to affect the terms and conditions of a victim's employment by hiring, firing, promoting, demoting, or reassigning to significantly different duties. These "supervisors" are individuals who truly have the opportunity to use their power to engage in improper actions against subordinates. An employer responsible for placing individuals in these

supervisory positions can fairly be said to have assumed the risk that they will misuse those powers. Conversely, the supervisor definition advocated by Petitioners would unfairly subject employers to vicarious liability in a multitude of workplace relationships where the employer has done nothing to empower individuals with authority that could potentially be misused. In the modern day workplace, unless all workers are automatons, there are necessarily numerous interactions of a supervisory nature on a regular basis amongst nearly all co-workers. For example, if one co-worker has a project that needs to be done, and solicits help from and directs another co-worker regarding what to do on that project, that co-worker could be said to be a supervisor and therefore subject an employer to vicarious liability. In this scenario, an employer would be placed in the impossible position of attempting to monitor every workplace relationship among all of its employees. Such a burden is unfair and unreasonable. The Eighth Circuit standard provides a clear and bright rule for employers and employees alike. When someone can control an employee by having the ability to hire, fire, promote, demote, or reassign to significantly different duties, he can be deemed a supervisor, and an employer will be subject to vicarious liability if those individuals subsequently harass their subordinates. If employers in fact have not empowered individuals with the potentially misused ability to take tangible employment actions against others in the workplace, the negligence standard properly protects workers and encourages employers to take remedial measures.

Petitioners cite three cases that they contend constitute a conflict in authority among the circuit courts. However, an analysis of those cases shows that Petitioners' contention of conflict is overstated and does not constitute sufficient grounds for granting the Petition.

Petitioners' contention that the decision in *Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001), conflicts with the Eighth Circuit's decision has no merit. Petitioners mistakenly state that in *Gawley* "the Seventh Circuit held that the harasser qualified as a supervisor for imputing liability to the employer even though he did not have the power to hire or fire the plaintiff since he had the power to initiate disciplinary proceedings against her and to delay her receipt of essential equipment." Petition at p.13. In reality, the court in *Gawley* reached no such conclusion. In fact, the court determined that it "need not definitively decide this question, however, because even if we assume [the harasser] was a supervisor as defined in *Ellerth* and *Faragher*, the university was entitled to raise an affirmative defense." *Id.* at 311. The court then held that the university satisfied both requirements of the affirmative defense. *Id.* at 312. Far from determining the harasser was a supervisor, as Petitioners contend, the court declined to rule on that issue because it found that even if the harasser was a supervisor, the defendant was entitled to summary judgment based on the affirmative defense set forth in *Ellerth* and *Faragher*.

Accordingly, the Seventh Circuit's decision in *Gawley* in no way conflicts with the Eighth Circuit decision here (and those other circuits listed above). Further, *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004), *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002), and other Seventh Circuit cases, decided after *Gawley*, adopt the same definition that the Eighth Circuit did in the present case.

In *Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003), *cert. granted*, 540 U.S. 1046, 124 S. Ct. 803, 157 L. Ed.2d 692 (2003), the Third Circuit did not make a definitive determination as to what was required for supervisory status. The Court merely found that "the record in this case

clearly reflected that (1) Easton was responsible for the day-to-day supervision of the McConnellsburg barracks and (2) both Baker and Prendergast had supervisory duties with respect to "running [their] shift[s]." *Id.* at 450. The court found that these allegations raised a genuine issue of material fact as to their supervisory authority, but made no determination as to whether those facts alone satisfied a finding of supervisory liability.

Only *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2nd Cir. 2003) arguably relaxes the standards set forth by the Eighth Circuit and all other circuit courts in determining who is a supervisor. In *Mack*, the court found that because the alleged harasser was the senior employee regularly on site, was the mechanic in charge, and had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanic's helpers, that the harasser was a supervisor. *Id.* at 127 n.11. This statement is set forth in a footnote, contains little analysis, is inconsistent with *Faragher/Ellerth* and does not constitute a conflict amongst the circuits such that the Petition should be granted. As set forth above, the Eighth Circuit standard for determining who is a supervisor, which is harmony with decisions of all other circuit courts, best promotes the purposes of Title VII.

Even if the court were to adopt the arguably relaxed standard contained in *Mack*, it is readily apparent that Gibbins would not be considered a supervisor even under that relaxed standard. Key to the court's holding in *Mack* were the facts that the alleged harasser was the "senior employee regularly on site" and "had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanic's helpers." *Id.* at 127 n.11. Neither of these factual predicates exist in the present case. As the district court found, Dave Burke was the superintendent, or lead foreman, at the Honeywell site

and was clearly senior to Gibbins. See Exhibit B to Petition at p. 14a. Further, Danny Franks was the carpenter's foreman and, as the carpenter's foreman, Franks provided Gibbins with direction as to what work needed to be performed by the laborers. *Id.* Thus, unlike in *Mack*, Gibbins was neither the senior employee regularly on site nor did he exercise the authority to make and oversee the daily work assignments of Cheshewalla.

Finally, Petitioners' argument that the circuit court's definition of a supervisor somehow "gives employers an inoculation against liability and emasculates protection afforded victims" does not withstand careful scrutiny, and provides no basis for granting the Petition. Almost all companies reserve final decision-making power in some person or entity other than the immediate supervisor, and there is no reason to believe that companies will ever be able to eschew the evaluative and administrative processes so completely that personnel decisions are formulated and influenced solely by individuals who have never had any contact with the subject employee.

Respondents' argument also ignores the undisputed record in this case, which shows that Gibbins did not have authority to hire, fire, promote or reassign Cheshewalla to significantly different duties and that, at most, Gibbins had some direction over her daily activities (which all courts have acknowledged does not elevate an individual to supervisor status for a vicarious liability). Further, in making decisions to lay off or reassign workers Ernie Patires solicited information from Rand's carpenter foreman, David Burke and superintendent Danny Franks, not Gibbins. There is no evidence that any recommendations Gibbins may have offered (albeit indirectly to Mr. Franks or Mr. Burke) were given substantial weight as would be required for Gibbins to even arguably be considered a "supervisor."

II. The Petition Should Not Be Granted Based On Any Alleged Conflict Between The Eighth Circuit And The Supreme Court Regarding Vicarious Liability In A Supervisor Sexual Harassment Case Being Predicated On Apparent Authority.

Petitioners' argument that the Petition should be granted because of a conflict with *Faragher/Ellerth* as to whether vicarious liability in a supervisor sexual harassment case may be predicated on apparent authority has no merit because the district court did in fact consider and reject that Gibbins had apparent authority, the facts in the case cannot support a finding of apparent authority, and the issue is not important enough to merit review.

Petitioners' assertion that the district court opinion simply ignored the "apparent authority" prong of *Faragher* and *Ellerth* is untrue. While duly noting that under Eighth Circuit precedent supervisory status could not be created based on apparent authority, the district court also agreed with Rand that 'agency principles require some act by the employer to create apparent authority; an individual cannot create his own apparent authority." Petition, Appendix A at p. 15a. This statement by the district court indicates that the district court in fact considered the apparent authority argument and rejected it based on the briefing and factual record in the case.

A review of the record confirms that the district court was right to reject a finding of supervisory status based on apparent authority as Petitioners have, in addition to failing to advance sufficient facts to make such a finding, made admissions fatal to any such finding. "Apparent authority results from a manifestation by a principal to a third party that reasonably leads a third party to believe that another person is acting as the principal's agent." *Millard Processing Services, Inc. v. N.L.R.B.*, 2 F.3d 258,

262 (8th Cir. 1993); *See also*, Restatement (Second) of Agency § 27 (1957).[2] In arguing that Gibbins had apparent authority to terminate Cheshewalla, Cheshewalla conveniently ignores the rule that the reasonable belief upon which Gibbins' apparent authority is based must be manifested by the *principal* (in this case Rand), not by the alleged tortfeasor. Cheshewalla admits that both "Christian and Patires told Monika that Gibbins could not lay her off," yet despite this fact she states that she continued to believe that he could. Because of this admission, she could not, as a matter of law, have a "reasonable belief" that Gibbins had authority to fire her or lay her off.

The facts cited by Petitioners to support their theory of apparent authority are misleading at best and illustrate the inherent difficulty in supporting a position in which apparent authority is based on after-the-fact, subjective belief. Gibbins was immediately transferred from the job site when Cheshewalla complained – and he never returned. Not only could he not lay her off, but Cheshewalla was not laid off until weeks later when she stopped showing up for work.

Petitioners state that Rand had "substantial knowledge that Gibbins was purporting to exercise the authority to fire and lay off workers, the record shows that Rand did *absolutely nothing* to stop Gibbins from making those claims. He kept making them. There is not a shred of evidence showing that Rand even instructed Gibbins to stop such threats, much less any evidence of disciplining him for making them." All information referenced in this

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[2] Comment a to § 27 provides in pertinent part, "For apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person, similar to the requirement for the creation of authority that the principal be responsible for the information which comes to the agent."

alleged evidence of "substantial knowledge" came from Christian's notes of a January 25 meeting with Cheshewalla. Far from doing "absolutely nothing," by this time, Gibbins had been removed from the workplace for several weeks and could not impact Cheshewalla's employment or make any claims that he could. This is a further example of misleading chronological fact shifting by the Petitioners.

Even assuming *arguendo* that Gibbins actually threatened to fire her, Cheshewalla's "reasonable belief" cannot be based on Gibbins' conduct. *See*, *Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 28 (3rd Cir. 1997) (rejecting vicarious liability as inappropriate when plaintiff knew harasser had no authority to fire her, "even assuming he threatened to do so"). Cheshewalla's subjective belief that Gibbins could and would fire her was not manifested by Rand. In fact, Rand took affirmative steps to dispel any confusion that Gibbins might have regarding such authority by telling Cheshewalla that Gibbins could not lay her off. Accordingly, Cheshewalla cannot as a legal matter succeed on an apparent authority analysis. Granting the Petition to examine that issue is therefore not appropriate.

III. The Petition Should Be Denied Because Even If The Court Were To Find In Petitioners' Favor Under Either Of The Two Questions Presented, The Sexual Harassment Claim Still Fails.

If the court were to ultimately decide either of the questions presented in Petitioners' favor, the ultimate favorable result for Petitioners would be a determination that Gibbins was a supervisor (as opposed to a mere co-worker). But a finding that Gibbins was a supervisor

would do nothing to alter the outcome in this case. Because the district court and circuit court both found that Gibbins was not a supervisor, they had no reason to address the question of whether Rand would be entitled to summary judgment pursuant to the affirmative defenses set forth in *Ellerth* and *Faragher*. Here, even if a ruling of this court were to overturn the lower court's holding that Gibbins was not a supervisor, a judgment in Rand's favor would still stand because the uncontroverted facts show that Rand satisfied the *Faragher/Ellerth* affirmative defenses.

In its Order granting Rand's Motion for Summary Judgment, the district court held that Gibbins was not a supervisor. The district court then noted that to prevail on her theory, Petitioner needed to prove that Rand knew or should have known about the alleged harassment and failed to take proper action. The district court found that Rand was not liable for Gibbins' conduct under this co-employee standard because Rand took proper action. Significantly, the Petitioners did not appeal the district court's holding that Rand took proper actions once it was alerted to allegations of alleged harassment.

There is no factual dispute that Gibbins did not take any action against Cheshewalla that would satisfy the *Ellerth* requirements for a tangible employment action. Gibbins did not fire Cheshewalla, did not fail to promote Cheshewalla, did not reassign Cheshewalla to a different job with significantly different responsibilities, and made no decision causing a significant change in benefits to Cheshewalla. Because no tangible employment action was taken against Cheshewalla, Rand is able to utilize the *Faragher/Ellerth* affirmative defense.

To satisfy the first element of the affirmative defense, Rand must show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior *Ellerth*, 527 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08. The record shows that Rand promulgated a sexual harassment policy, disseminated that policy to all employees, and it was signed by each of the plaintiffs. JA 911 (Christian Depo. 59:2-12). Rand's sexual harassment policy was posted at the job site, and every January the policy was distributed to all employees with their paychecks. JA 911 (Christian Depo. 56:2-12); JA 858 (Franks Depo. 24:3-8). The complaint procedures within Rand's sexual harassment policy demonstrate Rand's reasonable care in preventing sexual harassment, as there are alternative methods of reporting sexual harassment other than through the harassing supervisor. JA 383 (Rand's Sexual Harassment Policy).

The undisputed facts further show that Rand immediately started an investigation in November 2000 when it first heard of any potential problem (that being a rumor that a male employee had exposed himself). JA 913 (Christian Depo. 67:2369:8); JA 750 (Hageman Affidavit ¶ 2). Rand investigated this rumor by interviewing every woman, including Cheshewalla, employed by Rand at *any* Honeywell job site. *No one* reported any problems; thus, the investigation was closed. JA 751 (Hageman Affidavit ¶ 3). The next time Rand was aware of any potential harassment was when it received the anonymous phone call on December 19, 2000. JA 915 (Christian Depo. 75:7-15); JA 946 (Christian Depo. 199:20-25); JA 751 (Hageman Affidavit ¶ 4). Rand restarted its investigation and interviewed almost every Rand employee working at any Honeywell job site. More importantly, suspecting Cheshewalla might be the person allegedly harassed, Rand immediately took remedial action by transferring

Gibbins (the name provided in the anonymous phone call) to another jobsite. JA 918 (Christian Depo. 86:10-15). After Cheshewalla told Rand (on December 28, 2000) that she was upset that Gibbins had been transferred because Gibbins was one of the three people she could trust, and begged for his return, Rand officials were confused and concluded that they did not have sufficient information to conclude Gibbins was guilty of anything. JA 921 (Christian Depo. 97:15-19); JA 939 (Christian Depo. 169:24-170:2). At that point, Gibbins returned to the Honeywell Maintenance job site on January 8, 2001. JA 921 (Christian Depo. 97:1-19); JA 1003 (Gibbins Depo. 102:23-103:6). Then, on January 12, 2001, Cheshewalla alleged to the union business agent that she had been sexually harassed by Gibbins. JA 184. Gibbins was immediately and permanently transferred from the Honeywell maintenance job site on the basis of this report, even before Cheshewalla had confirmed the reports directly to Rand. Gibbins never returned to the Honeywell maintenance job site after that date. JA 1003 (Gibbins Depo. 103:1-11). Moreover, Cheshewalla did not report any harassment occuring after that date, when Christian was first alerted that it was in fact Cheshewalla who was allegedly being harassed by Gibbins. Gibbins lost his blue badge security clearance, and he was transferred to an outdoor, more onerous jobsite. JA 162 (Patires Affidavit ¶¶ 44-45). Eventually, Gibbins was demoted from his foreman status. JA 162 (Patires Affidavit ¶ 45). In light of the foregoing, it is undisputed that Rand acted with reasonable care to correct the sexual harassment alleged by Cheshewalla.

In order to satisfy the second element of the affirmative defense, Rand must show that Cheshewalla unreasonably failed to take advantage of any preventative or corrective opportunities provided by Rand or to avoid

harm otherwise. *Ellerth*, 527 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08.

Regarding that element, it is undisputed that Cheshewalla did not report Gibbins' alleged conduct until, at the earliest, January 12, 2001, when she reported allegations to the *union business agent* (not Rand). Indeed, she even *misled* Rand officers by bemoaning the transfer of one of three men she "trusted." However, Cheshewalla still did not report any alleged harassment *directly to Rand* until January 25, 2001 – *five months* after she began working at Rand – when Cheshewalla was interviewed by Christian and Patires. JA 948 (Christian Depo. 206:14-19); JA 205. Most, if not all, of any alleged harm to Cheshewalla (even though Rand denies Cheshewalla suffered any such harm) could have been avoided by Cheshewalla simply reporting Gibbins at the beginning of the "harassment" – which Cheshewalla maintains began "the first day" she started working at Rand. Under these circumstances, Cheshewalla did not exercise reasonable care to avoid sexual harassment by Gibbins or to otherwise avoid harm.

IV. No Basis Exists To Grant The Petition To "Renew" The Retaliation Case.

On page 17 of the Petition, Petitioners argue that "the retaliation case should also be renewed because its dismissal was a product of the lower court's failure to recognize the actionable nature of the underlying conduct." This assertion provides absolutely no basis for granting the Petition. Neither of the questions presented in the Petition have anything to do with the retaliation case. Further, Petitioners make no argument other than to disagree with the factual findings of the lower courts. That

does not constitute proper grounds for granting the Petition.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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